



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill limits access to public records.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Current Law

Section 744.107, F.S., allows the court to appoint a monitor “upon inquiry from any interested person” or upon its own motion. The monitor has authority to “investigate, seek information, examine documents, or interview the ward,” and to present a report of such findings to the court.<sup>1</sup> A family member or any other person with an interest in the proceedings may not serve as a monitor.<sup>2</sup> A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee shall be paid a fee for serving as a monitor.<sup>3</sup> The orders appointing court monitors and the reports of court monitors are not currently exempt from public disclosure.

##### HB 457

HB 457, to which this bill is the public records exemption companion, creates section 744.1075, F.S., entitled “emergency court monitor.” It states that a court may, upon inquiry from any interested person or upon its own motion, appoint a court monitor on an emergency basis without notice. The limitation on this authority is explained in the proposed s. 744.1075(1), F.S.:

The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward’s property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

The court order must specifically name the powers and duties of the monitor and the matters to be investigated. HB 457 provides that, pursuant to s. 744.1076, F.S., a section created by this bill, the order of appointment is confidential until the existence or absence of probable cause is determined. Fifteen days after entering the order of appointment, the monitor must file a verified report of findings and recommendations to the court, along with supporting documents or evidence. After reviewing the monitor’s report, the court must determine whether or not there is probable cause to take further action on behalf of the ward’s person or property. If there is no probable cause, the court must issue an order so stating and discharge the monitor.

If probable cause is found to exist, the court must issue a show cause order directing the guardian or other respondent to state the essential facts constituting the charge and directing the respondent to appear and show cause as to why the court should not take further action. The order must name a time and place for a hearing and provide “a reasonable time to allow for the preparation of a defense after service of the order.” The authority of an emergency monitor is limited to 60 days or until an order showing no cause is issued. However, the monitor’s authority may be extended by 30 days if there is a showing that emergency conditions still exist. Prior to the hearing on the order to show cause, the court may take action to protect the ward’s physical or mental health, safety, or assets, including

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<sup>1</sup> Section 744.107, F.S.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

issuing a temporary injunction, restraining order, or an order freezing assets. The court must give a copy of such order to all parties. After the hearing on the show cause order, the court may impose sanctions on the guardian, his or her attorney, or any other respondent, and the court may also take any other action authorized by law.

### **Effect of Bill**

This bill provides that the order of any court appointing a monitor pursuant to s. 744.107, F.S., or appointing a monitor on an emergency basis pursuant to s. 744.1075, F.S., is exempt from public records requirements. The required reports submitted by the monitor relating to the medical condition, financial affairs, or mental health of the ward, are confidential and exempt<sup>4</sup> from public disclosure. The reports may be subject to inspection as determined by the court or upon a showing of good cause. The public records exemptions expire if a court makes a finding of probable cause, except that information otherwise made confidential or exempt shall retain its status as such.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause are confidential and exempt from public records requirements. However, the determinations and orders finding no probable cause may be subject to inspection as determined by the court or upon a showing of good cause.

The bill provides for future review and repeal of the exemptions on October 2, 2010, pursuant to the Open Government Sunset Review Act of 1995. It also provides a statement of public necessity and provides an effective date that is contingent upon the passage of HB 457 or similar legislation.

### **C. SECTION DIRECTORY:**

Section 1. Creates s. 744.1076, F.S., creating a public records exemption for a court order appointing a court monitor or emergency court monitor, certain reports of the monitors, and court determinations relating to probable cause.

Section 2. Provides a statement of public necessity.

Section 3. Provides a contingent effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

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<sup>4</sup> There is a difference between information and records that the Legislature has made exempt from public disclosure and those the Legislature has made confidential and exempt. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The public records law in general creates a significant, although unquantifiable, increase in government spending. Government employees must locate requested documents and information, and must examine every requested document or piece of information to determine if a public records exemption prohibits release of the document or information. Passage of any new public records exemption will result in a minimal negative non-recurring fiscal impact, because governments will be required to communicate the new exemption to employees responsible for complying with public records requests. Every public records exemption also represents an unknown negative recurring expense to governments, as each exemption slightly increases the number and complexity of the training and management materials required to be maintained by governments, further complicates the process of complying with public records requests, and increases the chances that a government will be involved in litigation. There is no known reliable method for determining the marginal fiscal impact attributable to a single public records exemption.

Because there are similar exemptions in current law, state and local governments should already have processes in place to comply with the law, thus minimizing the cost.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

**Vote Requirements**

Article I, s. 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings exemption.

**Public Records Law**

Article I, s. 24(a), of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of the government.

In general, "all court records are presumed open."<sup>5</sup> Subject to the rulemaking power of the Florida Supreme Court, as provided by art. V, s. 2, of the Florida Constitution, the public shall have access to all records of the judicial branch of government and its agencies, except as otherwise provided.<sup>6</sup> Various court records are presently deemed confidential by court rule, by Florida Statutes, and by prior case law of the state.<sup>7</sup>

The Legislature may provide for the exemption of records from the requirements of Art. I, s. 24, of the Florida Constitution by passage of a general law. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995<sup>8</sup> provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

**B. RULE-MAKING AUTHORITY:**

This bill does not grant rule-making authority to any administrative agency.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

**Civil Justice Committee**

The Civil Justice Committee considered this bill on March 16, 2005, and adopted one amendment. The amendment to the bill states that only reports of court monitors relating to the medical condition, financial affairs, or mental health of the ward shall be confidential and exempt, rather than making all court monitor reports confidential and exempt. The order appointing the court monitor and emergency court monitor remains confidential and exempt from public records requirements.

The Civil Justice Committee reported the bill favorably with as HB 947 with a committee substitute.

**Governmental Operations Committee**

On April 13, 2005, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably with committee substitute. The strike-all amendment provides that the court order appointing the court monitor or emergency court monitor is exempt, instead of confidential and exempt, from public records requirements. This change will allow the court monitor or emergency court monitor to gather information, such as medical records or financial records, from the appropriate sources by allowing the monitor for purposes of verification to show the custodian of those records the order appointing him or her as a monitor. The strike-all amendment clarifies that the exempt and confidential information will be made available to the public if a court makes a finding of probable cause. Finally, it amends the public necessity statement to comport with the public records exemption.

<sup>5</sup> *Times Publishing Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).

<sup>6</sup> *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185, 1188 (Fla. 1995).

<sup>7</sup> *Id.* at 1189; Rule of Judicial Administration 2.051(c)(9).

<sup>8</sup> Section 119.15, F.S.